84204-3

NO. 37508-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BEADLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Richard Brosley, Judge
The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS

RULES, STATUTES AND OTHERS

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

A. ASSIGNMENTS OF ERROR

1. Appellant's right to confrontation was violated when the court admitted child hearsay statements where there was no showing the child was unavailable.

2. The court erred in entering conclusion of law 2.2, "[t]hat B.R.A. is unavailable as a witness at trial; the evidence does not suggest B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." (CP 41-44, Findings of Fact and Conclusions of Law Regarding Child Hearsay Hearing, incorporated herein).

3. Appellant's right to confrontation was violated when the court admitted testimonial hearsay statements and appellant had no opportunity to cross examine the declarant.

4. The court erred in entering conclusions of law 2.5, 2.6, 2.8, 2.9, 2.10 and 2.11 (CP 41-44, Findings of Fact and Conclusions of Law Regarding Child Hearsay Hearing).

5. The court erred in admitting irrelevant and unfairly prejudicial testimony about the child's behavior and initial refusal to testify at the first pretrial child hearsay hearing.

Issues Pertaining to Assignments of Error

1. The four-year-old complainant, made statements to a number of people alleging appellant committed acts of sexual misconduct. A child hearsay hearing was conducted over the course of a month and consisted of three separate hearings where testimony was taken. At the first hearing, the child was brought to court to testify but for some inexplicable reason became upset, cried, would not speak and refused to testify. Later, at that same hearing, the State told the court the child apparently changed her mind about testifying but the court had other matters to deal with and continued the hearing without taking the child's testimony. There is no evidence the child was brought to court at any of the subsequent pretrial hearings or was asked to testify at any of those hearings or at trial. The court never held a hearing to determine the reasons for the behavior or whether the child could testify at the trial. Trial began over two months after the first child hearsay hearing and the child did not testify. There was no evidence the child would not have testified at the trial in person, via closed-circuit television or by any other alternative means. The court nonetheless concluded the child was unavailable to testify at trial under RCW 9A.44.120 and unable to testify via closed-circuit television.

a. Where there was no evidence of the reasons for the child's behavior and initial refusal to testify at the first pretrial hearing and no evidence the child could not have testified at any of the subsequent pretrial hearings or at the trial, did the court erroneously conclude the child was unavailable to testify at the trial, which was held over two months after the first child hearsay hearing?

b. Where there was no evidence the child would not have testified at trial via closed-circuit television did the court erroneously conclude the child was likely unable to testify via closed-circuit television at the trial?

c. Where the court improperly found the child unavailable to testify at trial and improperly concluded the child was likely unable to testify at trial via closed-circuit television did the admission of the child's hearsay statements violate RCW 9A.44.120 and appellant's right to confrontation?

2. The child complainant made statements to her mother and stepfather alleging appellant had inappropriate sexual contact with her. The mother asked the child if she would talk about it with police and the child agreed. Shortly thereafter the child was taken to the police station and interviewed by a detective and a Child Protective Services (CPS)

investigator whose assistance the detective requested. The interview was conducted solely for law enforcement purposes. The child did not testify at trial, however, the court found her hearsay statements to the detective and investigator were not testimonial and admitted the statements.

a. Did the court erroneously conclude the hearsay statements were not testimonial?

b. Did the admission of the child's hearsay statements violate appellant's right to confrontation?

3. The child complainant was brought to the courthouse to testify at the first child hearsay hearing. At some point before the child was taken into the courtroom to testify, she started to cry, became upset, crawled into a corner and refused to testify. The child's behavior and refusal to testify was unexplained. Over appellant's objection the court admitted testimony at the trial describing the child's behavior at the first pretrial hearing and her initial refusal to testify at that hearing. Did the court err in admitting this irrelevant and unfairly prejudicial evidence?

B. STATEMENT OF THE CASE

1. Procedural History

Steven Beadle was charged by a third amended information with three counts of first degree child molestation. CP 69-70. B.A. was named the victim in all three counts. Id.

A jury found Beadle guilty of two counts. CP 49, 51. The jury also found Beadle abused his position of trust to facilitate the crimes and the crimes were an ongoing pattern of sexual abuse. CP 45, 46, 48, 50.

Based on the jury's verdict and Beadle's offender score, the court imposed an exceptional sentence. CP 20-37. The standard range sentence was 198 months for each count. Id. Beadle was sentenced to minimum term of 396 months and a maximum term of life. Id.

2. Statement of Facts[1]

Lisa Burgess first met Beadle years earlier when she was a child. 4RP 23. Burgess eventually moved to California where her daughter, B.A., was born. In October 2004, Burgess moved back to Washington and a month later began living with Beadle. 4RP 24. Burgess also met her

---

[1] 1RP refers to the verbatim report of proceedings for November 16, 2007; 2RP November 20, 2007; 3RP December 19, 2007; 4RP January 30, 2008; 5RP January 31, 2008 and 6RP March 17, 2008. of the volume.

husband, Damon Burgess[2], in October 2004. 4RP 23. When Burgess and Beadle ended their relationship and Beadle moved out, Burgess was pregnant with Beadle's child, R.B. 4RP 24-25. The day after R.B. was born, Burgess and Beadle started living with each other again. 4RP 26. They lived together until January 2006 when Beadle was sent to prison for an unrelated matter. Id. A few weeks later Burgess "split up" with Beadle. 4RP 27.

Two month later, Burgess married Damon Burgess in April 2006. 4RP 27. The following October, Burgess left Damon Burgess for a couple of weeks and during that time resumed a sexual relationship with Beadle, who was no longer incarcerated. 4RP 27. Damon Burgess admitted that Beadle told him he slept with Burgess while Damon Burgess and Burgess were married. Damon Burgess told Beadle to stay away from his family. 4RP 73-74.

According to Burgess, shortly before Beadle left for prison in January 2006, B.A. drew something she called a "tail." 4RP 28. The word "tail" is what B.A. used to describe a penis. When Burgess asked her about the drawing B.A. told her "tail" was what Beadle told her to call what she drew. Id. B.A., who at the time referred to Beadle as "daddy", also told

---

[2] Damon Burgess is referred to as Damon Burgess throughout the brief to avoid confusion with Lisa Burgess.

Burgess that "daddy" tried to put his "tail" inside her and her "potty" hurt. 4RP 31-32, 39. Burgess said "potty" was B.A.'s word for vagina. 4RP 40.

After talking with B.A., Burgess said she immediately confronted Beadle in B.A.'s presence. She said Beadle screamed at B.A. and told B.A. that he would go to prison if she said anything to anyone. 4RP 31. Because Beadle was going to prison soon, Burgess put the incident "out of her mind." Id.

A little over a year later, in February 2007, and shortly after Beadle told Damon Burgess he slept with Burgess, B.A., R.B. and Burgess were driving to Anacortes with Damon Burgess because he was going to do a job there. 4RP 41, 68. The family rode in two cars: Damon Burgess and B.A. rode in one car and Burgess and R.B. in another. 4RP 41. During the trip, B.A. again drew a picture of a "tail" and showed it to Damon Burgess. 4RP 68. Damon Burgess asked B.A. whose "tail" it was and she said it was Beadle's "tail." 4RP 69. He then asked B.A. if she had ever seen the "tail" and she said yes and Beadle had to help her wash her hands because they became sticky. Id. Damon Burgess held out his hand and asked B.A. to show him how she touched the "tail" and, according to

Damon Burgess, she stroked his fingers. 4RP 69. B.A. also told Damon Burgess she did not want to get Beadle into trouble. 4RP 70.

Damon Burgess flagged down Burgess and told her they needed to stop so B.A. could change cars and ride with Burgess. 4RP 70. They all stopped, got something to eat and then B.A. got into the car Burgess was driving. 4RP 42. Burgess asked B.A. if there was a time when Beadle helped her wash her hands. 4RP 44. B.A. told Burgess that she came into the bedroom once when Burgess and Beadle were sleeping, got into the bed, and Beadle had her touch his "tail" and then helped her wash her hands because they became sticky. 4RP 44. Burgess also asked B.A. about the time a year earlier when B.A. told Burgess her "potty" hurt and B.A. responded she already told Burgess about it. 4RP 47. B.A. told Burgess that while she was touching him, Beadle told her he loved her and she was a good girl. 5RP 4. B.A. also told Burgess she saw Damon Burgess's "tail" once by accident but it was different than Beadle's because Beadle's "tail" was strong and tough. 5RP 3.

Burgess then asked B.A. if she would talk to police and B.A. agreed. The following day Burgess spoke to Lewis County Detective Carl Buster and arranged for him to interview B.A. 4RP 46.

On February 22, 2007 Burgess brought B.A. to the police station for the interview. 5RP 8. Detective Buster had contacted Ronnie Jensen, an investigator with CPS, to assist him with the interview. 4RP 103-104. The two interviewed B.A. During the interview B.A. pointed to the genital area of a bear doll and said that is where the "tail" is and that she was told to touch it and it got wet. 4RP 108; 5RP 15. She said after she touched it she had to wash her hands because they were slippery. 5RP 16. Buster admitted he did not refer B.A. to the sexual assault clinic for an examination. 5RP 22.

Carrie McAdams, a clinician with Cascade Mental Health, evaluated B.A. in April 2007, about two months after B.A.'s interview with Buster and Jensen. 4RP 75, 79. When McAdams asked B.A. why she was there, B.A. told her it was because "Steve did things to me." 4RP 80. She told McAdams that he helped her wash her hands, which had become sticky from his "tail." Id. B.A. said that sometimes Beadle sat with her with a towel on his lap and his "tail" between them and he made her touch it. Id. B.A. said it happened three times and that her "potty" hurt. 4RP 80-81.

Margaret Heriot, a Cascade Mental Health therapist, was assigned to counsel B.A. 4RP 90, 93. During their first session, B.A. told Heriot

that Beadle hurt her "potty." 4RP 93. During their third session, B.A. removed clothes from a male doll and placed the male doll in a sitting position with its legs out. She then removed clothes from a baby doll and placed the baby doll on the lap of the male doll, facing the male doll. Id. B.A. told Heriot that it hurt. 5RP 93. On the way home from the session, B.A. told Burgess that once when Burgess was not at home, she sat on Beadle's lap on the floor and he needed a towel. 4RP 50-51.

Beadle testified he never touched B.A. inappropriately and he never had her touch him inappropriately. 5RP 25. He denied Burgess every confronted him about touching B.A. while in B.A.'s presence. 5RP 28.

3. Child Hearsay Hearing

A child hearsay hearing was held on three separate days, November 16th, 20th and December 19, 2007. At the November 16th hearing, Heriot, Jensen and Damon Burgess testified about B.A.'s statements to them and the circumstances surrounding the statements. 1RP 7-43. Jensen testified she assisted Buster with B.A.'s February 22, 2007 interview as a courtesy and that the interview was strictly for law enforcement purposes. 1RP 27, 31.

Jensen also testified B.A. was in a corner in the courthouse in a fetal position. 1RP 32. Jensen said that after about 20 minutes, she and Burgess

managed to get B.A. to play but B.A. indicated she did not want to talk. 1RP 32. Later, the deputy prosecuting attorney told the court that it did not look as if B.A. was going to be able testify at the hearing. 1RP 46. Shortly thereafter, the deputy prosecuting attorney informed the court that B.A. was now "willing to come into the courtroom." 1RP 47. The court, however, had other matters to deal with so it continued the hearing without taking B.A.'s testimony. 1RP 47, 49.

The hearing resumed November 20, 2007. During that phase of the hearing Burgess and Buster testified. At the end of their testimony, the deputy prosecuting attorney told the court that "[B.A.] is not willing to come into the courtroom, so the State has no further witnesses." 2RP 46. There is nothing in the record to indicate B.A. had been brought to the courthouse that day or was asked to testify. The hearing was continued again to December 19 2007 to allow the State to present McAdams' testimony. 2RP 46.

At the conclusion of the December 19, 2007 hearing, the State asked the court find B.A. unavailable to testify at trial based on Jensen's November 16, 2007 testimony. 3RP 18. The State argued, "[t]o bring her (B.A.) into court would obviously cause her a lot of trauma, and she doesn't want to come in, so I think that's a basis to find her unavailable."

Id. The court found B.A. was unavailable based on her initial refusal to testify at the November 16, 2007 hearing. 3RP 24.[3]

Beadle argued B.A.'s hearsay statements were not reliable or corroborated and in addition the statements made to Buster and Jensen were testimonial and inadmissible if B.A. did not testify at trial. 3RP 19-20. The court ruled under the holding in State v. Shafer[4] the test to determine if a child's hearsay statements are testimonial is whether the child intended her statements be used in any subsequent prosecution. 3RP 35-36. The court found that from Buster and Jensen's perspective, B.A.'s statements were testimonial. 3RP 35-36. But, because B.A. was only four years old she could not have intended that her statements to Buster and Jensen would be used to prosecute Beadle and therefore from B.A.'s perspective the statements were not testimonial. Id. The court concluded that because B.A.'s statements to Jensen and Buster were not testimonial, reliable and

---

[3] "The Court observed that when the child was here for the purpose of testifying there was s substantial amount of crying and screaming coming from the public potion of the hallway outside the courtroom door, and Mr. Hays (deputy prosecuting attorney) at the time related to the court -- and it was not disputed by Mr. Brown (defense counsel) or Mr. Beadle -- that this yelling and screaming that was coming in was coming from the child, and she was doing it in resisting her -- any and all attempts to bring her into the courtroom." 3RP 24.

[4] 156 Wn.2d 381, 389 n. 6, 128 P.3d 87 (2006).

corroborated, those statements were admissible under RCW 9A.44.120. 3RP 34-36; 39-40.

The court also found that B.A.'s statements to Burgess, Damon Burgess, McAdams, Heriot were reliable, corroborated and admissible under RCW 9A.44.120 and her statements to McAdams and Heriot admissible under the medical exception to the hearsay the rule as well. 3RP 24-32. The court entered findings of fact and conclusions of law. CP 41-44.

4. Facts Pertaining to Assignment of Error 3

On the day the trial began, January 30, 2008, the State moved to admit testimony describing B.A.'s behavior and initial refusal to testify at the November 16, 2007 pretrial hearing. 4RP 13. Beadle objected arguing the evidence was too prejudicial because there are a number of "explanations as to why a child would not want to come into court and testify." 4RP 14-15. The court conceded there was no evidence about the reasons for B.A.'s behavior or refusal: "I don't now if it was trauma or fear or what. . . ." 4RP 15. Nonetheless the court ruled the State could present testimony that B.A. cried became upset and resisted attempts to get her testify. 4RP 16.

At trial Burgess was allowed to testify that at the November 16, 2007 hearing B.A. was brought to court to testify and was ready and willing to testify but she ran into a corner and stayed there for an hour crying and refused to talk. 4RP 55-56. Jensen too was allowed to testify that B.A. was balled up in a fetal position and appeared upset. 4RP 112.

C. ARGUMENTS

1. THE ADMISSION OF B.A.'S HEARSAY STATEMENTS VIOLATED RCW 9A.44.120 AND BEADLE'S RIGHT TO CONFRONTATION WERE THE COURT ERRONEOUSLY CONCLUDED B.A. WAS UNAVAILABLE TO TESTIFY AT THE TRIAL AND WAS LIKELY UNABLE TO TESTIFY VIA CLOSED-CIRCUIT TELEVISION.

B.A. did not testify at trial. The court, however, admitted B.A.'s hearsay statements to Lisa Burgess, Damon Burgess, Heriot, McAdams, Jensen and Detective Buster under RCW 9A.44.120. The statements were improperly admitted because there was no showing B.A. was unavailable.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .". U.S. Const. amend. VI. The Washington Constitution provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . .". Const. art. I, § 22.

The rule against hearsay addresses values similar to those protected by the confrontation clause. State v. Rohrich, 132 Wn.2d 472, 477-78,

939 P.2d 697 (1997) (confrontation clause, like hearsay rules, represents a preference for live testimony to maximize the truth-determining function of criminal trials); Idaho v. Wright, 497 U.S. 805, 814, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990) (hearsay rules and the confrontation clause are designed to protect similar values).

The admissibility of hearsay statements in criminal trials depends, in part, on whether those statements are testimonial. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A testimonial statement is inadmissible unless the declarant either: (1) appears at trial; or (2) is unavailable and the defendant had a prior opportunity to cross-examine on the statement. Id. at 68; accord State v. Clark, 139 Wn.2d 152, 158, 985 P.2d 377 (1999) (defendant s opportunity to cross-examine regarding hearsay statements satisfies Confrontation Clause). Testimony admitted under the child hearsay statute too must be interpreted in light of the requirements of the confrontation clause. Rohrich, 132 Wn.2d at 476.

The confrontation clause prefers the State elicit the damaging testimony from the witness while under oath in a face-to-face confrontation. State v. Rohrich, 132 Wn.2d at 479. The constitutional preference for live testimony may be disregarded in only two circumstances: (1) when the

original out-of-court statement is inherently more reliable than any live in-court repetition would be; or (2) when live testimony is not possible because the declarant is unavailable, in which case the court must settle for the weaker version. The first exception applies only to those firmly rooted hearsay exceptions, which, by their nature, are most reliable when originally made. Id. Child hearsay admitted under RCW 9A.44.120 does not fall within a firmly rooted hearsay exception. Id. at 480.

Under the child hearsay statute, the statement of a child under 10 years old describing any act of sexual contact is only admissible if (1) the court finds the statement is reliable and (2) the child testifies or, if the child is unavailable, there is corroborative evidence of the act. RCW 9A.44-.120.[5] It is the State's burden to prove both the child's unavailability and

---

[5] In pertinent part RCW 9A.44.120 provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, . . . not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings, . . . if:
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement
> (continued...)

corroborative evidence. "If the child does not testify about the alleged sexual contact, the child's hearsay statements are not admissible unless the prosecutor both establishes the child is unavailable as a witness and provides corroborative evidence of the act." State v. Rohrich, 82 Wn. App. 674, 676, 918 P.2d 512 (1996), *aff'd*, 132 Wn.2d 472, 939 P.2d 697 (1997) (citing RCW 9A.44.120 and State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984)). A trial court's decision to admit hearsay statements under RCW 9A.44.120 is reviewed under the abuse of discretion standard. State v. Smith, 148 Wn.2d 122, 134, 59 P.3d 74 (2002); State v. Swan, 114 Wn.2d 613, 648, 790 P.2d 610 (1990). The admission of hearsay statements under RCW 9A.44.120 without proof of unavailability or corroborative evidence is an abuse of discretion. State v. Rohrich, 82 Wn. App. at 679.

On this record, the State failed to meet its burden to prove B.A. was unavailable to testify at the trial. Unavailability means that the proponent is not presently able to obtain a witness' testimony. "It is usually based on the physical absence of the witness, but may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory."

---

[5](...continued)
may be admitted only if there is corroborative evidence of the act.

State v. Ryan, 103 Wn.2d at 171 (citing ER 804(a) and 5A K. Tegland, Wash. Prac., Evidence § 393 (2d ed. 1982)).

B.A. initially refused to testify at the November, 2007 pretrial hearing.[6] It was based on that initial refusal and B.A.'s behavior that hearing the led the court to conclude B.A. was unavailable to testify at the trial. CP 41-44 (Finding of Fact 1.9, Conclusion of Law 2.2). However, before the court recessed for the day the State informed the court, "[n]ow I'm told that she (B.A.) is willing to come into the courtroom" but the court did not take her testimony because it was scheduled "to do the prelims." 1RP 47. Thus, despite B.A.'s initial refusal to testify and her behavior, crying and balling herself up in the corner, the record shows she was likely available to testify at the pretrial hearing and therefore the court's determination she was unavailable to testify at trial based on her earlier behavior is unsupported. The facts undermine the court's finding B.A. was unavailable to testify at the trial based as it was on her initial refusal and behavior at the first pretrial hearing.

Even if B.A. was unavailable to testify at the first pretrial hearing, which is doubtful given the State's assertion, there was no showing she was unavailable to testify at the trial, which occurred over 2 ½ months later.

---

[6] The court did not find B.A. unavailable because she was incompetent.

There are many possible reasons why B.A. initially refused to testify at the pretrial hearing. See, ER 804(a)(4) (which defines "unavailability" as being "unable . . . to testify . . . because of . . . then existing physical or mental illness or infirmity. . ."). For example, she may have been intimidated because Beadle was in the courtroom; traumatized by the idea of telling her story to a room of strangers; physically ill; or even scared because she lied and she was afraid by testifying her lie would be discovered. Because the trial did not begin for months following the pretrial hearing, the reason B.A. refused to testify at the pretrial hearing may have had no bearing on her ability or willingness to testify at the trial. But, because the reason is unknown, the State failed to meet its burden to show B.A. was unavailable to testify at the trial.

The issue would not be present if the court had conducted an adequate hearing before the trial to determine whether B.A. was unavailable to testify at the trial. See, State v. Hopkins, 137 Wn. App. 441, 154 P.3d 250 (2007) (there the parties stipulated the child was incompetent and based on the stipulation and its "own non-hearing assessment" the court found the child "unavailable" to testify at trial. Id. at 450. This Court held the trial court was required to conduct a hearing to determine whether the child was incompetent and thereby "unavailable" before admitting the child's

hearsay statements under RCW 9A.44.120). If the court had conducted an adequate hearing, it could have determined if B.A. in fact refused to testify, and if so, the reasons for her refusal and whether those reasons would prevent her from testifying at the trial.

On this record, however, there is no showing that B.A. was unable or unwilling to testify at the trial. The court's conclusion of law "[t]hat B.R.A. is unavailable as a witness at trial" is unsupported by the evidence. CP 41-44 (Conclusion of Law 2.2); See, State v. Ague-Masters, 138 Wn. App. 86, 97, 156 P.3d 265 (2007) (substantial evidence must support the findings of fact and the finding must support the trial court's conclusions of law); see also State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (findings are supported by substantial evidence only if the evidence is sufficient to persuade a fair-minded, rational person of the truth of the finding). And, given that B.A. was apparently ready to testify at the hearing (4RP 55) and apparently ready and willing to testify after her initial refusal (1RP 47), not only does the record fail to show B.A. was unavailable to testify at the trial, it suggests otherwise.

Furthermore, the court erroneously concluded that B.A. was unable to testify via a closed-circuit television. The lengths the prosecution must go to produce the witness is "a question of reasonableness." California v.

Green, 399 U.S. 149, 189 n.22, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); see ER 804(a)(5) (same). The State is required to avail itself of whatever procedures exist to bring a witness to trial. State v. Goddard, 38 Wn. App. 509, 513, 685 P.2d 674 (1984). Because B.A.'s unavailability was not based on a finding of incompetence but refusal and because the trial did not begin for weeks after the initial pretrial hearing, at a minimum, the State was required to show B.A. was still unavailable as a witness at the time of trial, which includes a showing she could not testify via closed-circuit television.

The Washington Supreme Court has held that "in determining whether a witness is unavailable, under the good faith requirement, a court should consider what options are available to the State in securing the child victim's testimony." Smith, 148 Wn.2d at 136. The Smith Court ruled the use of RCW 9A.44.150, which provides prosecutors with the option of using closed-circuit television if a child witness is unable to testify in open court, is one such option. Id. at 137.

In Smith, the child victim lacked the emotional stamina to testify with the defendant present. The trial court, however, lacked the necessary technology and resources to provide any kind of closed-circuit televised testimony from another location so it did not consider that an option. The

Supreme Court reversed Smith's conviction. The Smith Court held the child's hearsay statements inadmissible because the trial court did not explore alternatives to live court room testimony, such as remote testimony via closed-circuit television, before deciding to allow the child hearsay testimony. State v. Smith, 148 Wn.2d at 137.

Here, the court concluded "[t]he evidence does suggest that B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." CP 41-44 (Conclusion of Law 2.2). Again, because there is nothing in the record to show why B.A. initially refused to testify at the first pretrial hearing, why she apparently changed her mind before the hearing was continued, or if she would have testified at the time of trial months after the first pretrial hearing, it is impossible to conclude, as the court did here, that she could not have testified at trial via a closed-circuit television or by some other alternative means. Without that evidence the court had no basis to conclude B.A. was unable or unwilling to testify at trial, weeks later, via closed-circuit television. The evidence simply does not support the court's conclusion.

The hearsay statements of a child, even if reliable and corroborated, are not admissible unless the child is unavailable to testify at trial. The record here does not show B.A. was unavailable to testify at the trial so

her hearsay statements were inadmissible. See, Rohrich, 132 Wn.2d at 482. (where child does not testify as required yet is available, the hearsay statements are inadmissible under RCW 9A.44.120). Further, even if B.A. had refused to testify at trial, there is no evidence B.A. could not have testified via closed-circuit television or some other alternative means.

On this record, the court improperly admitted B.A.'s hearsay statements. And, because those statements were the only evidence against Beadle, his convictions should be reversed. Smith, 148 Wn.2d at 139.

2. THE ADMISSION OF TESTIMONIAL STATEMENTS VIOLATED BEADLE'S RIGHT TO CONFRONTATION.

The Confrontation Clause permits an unavailable witness's testimonial statements to be introduced at trial only if the witness has been subject to the rigors of cross-examination. Crawford v. Washington, 541 U.S. at 53-54. Specifically, where a child's testimonial hearsay is at issue, a defendant's right to confrontation bars its admission without cross-examination, even if the trial court finds the hearsay reliable. Bockting v. Bayer, 399 F.3d 1010, 1021 (9th Cir.2005), *amended*, 408 F.3d 1127 (9th Cir.2005), *reversed on other grounds sub nom.*, Whorton v. Bockting, __ U.S.__, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

While Crawford did not provide a comprehensive definition of the term testimonial it articulated three core classes of testimonial statements:

ex parte, in-court testimony or its functional equivalent; extrajudicial statements in formalized testimonial materials, such as affidavits, depositions, or prior testimony; and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. State v. Shafer, 156 Wn.2d 381, 389 n. 6, 128 P.3d 87 (2006) (citing Crawford, 541 U.S. at 51-52). The Crawford Court stated a testimonial statement " applies at a minimum to prior testimony . . . and to police interrogations." Crawford, 541 U.S. at 68, 124 S.Ct. 1354. "[C]asual remarks made to family, friends, and nongovernment agents are generally not testimonial statements because they were not made in contemplation of bearing formal witness against the accused." Shafer, 156 Wn.2d at 389 (citing Crawford, 541 U.S. at 51). A statement "knowingly given in response to structured police questioning" is testimonial under "any conceivable definition." Crawford, 541 U.S at 53 n. 4.

B.A.'s statements to Jensen and Detective Buster were made in response to questions during a police interview conducted to gather evidence in anticipation of a possible trial. Jensen testified, and the court found, the interview as conducted for law enforcement purposes and she was at the interview to assist Buster. 1RP 31; CP 41-44 (Finding of Fact 1.9). The

interview falls within the category of police interrogations and B.A.'s statements made at the interview constitutes testimonial hearsay.

The trial court, however, inexplicably relied on Shafter to find B.A.'s statements to Jensen and Buster were not testimonial. CP 41-44 (Conclusion of Law 2.5). Shafer does not support the trial court's analysis.

In Shafer, a three-year-old child told her mother that her Uncle had touched her privates and told her to kiss his privates. Shafer, 156 Wn.2d at 383-84. The trial court denied Shafer's motion to exclude the child's hearsay statements to a family friend who previously worked as a police informer but who was not acting in any law enforcement capacity when she interviewed the child. Id. at 384-85. The Supreme Court rejected Shafer's argument that the child's statements to her mother and the friend were testimonial. The Shafer Court reasoned that a victim's statements to friends and family are generally nontestimonial statements because there is no "contemplation of bearing formal witness against the accused." Id. at 389. The Court also noted, "[a] three-year-old child, whether T.C. or a fictional reasonable one, who tells her mother and a family friend in a private setting about sexual abuse is not making the statements in anticipation that the statements will later be used to prosecute the alleged sexual abuse perpetrator." Id. at 390 n. 8. The Court observed, "[o]f the testimonial

statements identified as such in Crawford, the common thread binding them together was some degree of involvement by a government official, whether that person was acting as a police officer, as a justice of the peace, or as an instrument of the court." Id. at 389.

Unlike the statements in Shafer, which were made to a family member and family friend in a private setting, B.A.'s statements were made in response to questioning by a police officer at the police station. Also, B.A.'s mother specifically asked B.A. if she would talk to police about her allegations against Beadle and got B.A.'s consent. It is logical to assume, on these facts, B.A. knew there could be criminal implications for Beadle as a result of her making allegations to police, despite her youth. Contrary to the court's analysis, under the holding in Crawford and Shafer, B.A.'s statements to Buster were testimonial.[7]

This Court's holding in Hopkins, supra, likewise supports the conclusion that B.A.'s statements to both Jensen and Buster were testimonial. In Hopkins, a two-and-a-half year old child was interviewed

---

[7] If the trial court's analysis is carried to its logical conclusion, a particularly young child's hearsay statements to police are never testimonial unless the defense presents evidence (which would be near impossible if the child never testifies) that the child knew the statements would be used in a subsequent prosecution. The right to confrontation does not hinge on the age of the declarant. If it did, an accused would never have the right to confront an accuser if the accuser is a young child. There is simply no authority for that proposition.

by a social worker who testified her job was to investigate whether the child's allegations were truthful and provide the results of the interview to police. 137 Wn. App. at 447. The Hopkins court held the child's statements to the social worker were testimonial reasoning the social worker "was also acting in a government capacity for CPS and, in that capacity, she obtained statements from MH (the child) that the State used to prosecute Hopkins." Id. at 458.

Here, Jensen too was acting in a government capacity. She was asked to assist Buster when he interviewed B.A. and she testified the interview was conducted solely for law enforcement purposes. Thus, like the statements made to the social worker in Hopkins, the statements made simultaneously to Jensen Buster and were also testimonial and inadmissible.[8]

---

[8] Other jurisdictions have reached the same conclusion. See, T.P. v. State, 911 So.2d 1117, 1123-24 (Ala. 2004) (child's statements about sexual abuse to interviewer employed by Department of Human Resources at interview that was attended by a sheriff's investigator were testimonial); Anderson v. State, 833 N.E.2d 119, 125-26 (Ind. Ct.App. 2005) (child's statements about sexual assault made to social worker during interviews that were coordinated and directed by police detective were testimonial); State v. Justus, 205 S.W.3d 872, 880-81 (Mo. 2006) (child's statements describing sexual abuse during interviews conducted by child abuse investigator for division of family services and by licensed social worker employed at a children's advocacy center were testimonial); State v. Blue, 717 N.W.2d 558, 564-65 (N.D. 2006) (child's videotaped statements describing sexual assault to a forensic interviewer made while police officer (continued...)

The Washington Supreme Court has ruled that a violation of the right to confrontation is subject to a constitutional harmless error analysis. State v. Watt, 160 Wn.2d 626, 634-35, 160 P.3d 640 (2007). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). The reviewing court "decides whether the actual guilty verdict was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), *aff'd*, 137 Wn.2d 712, 976 P.2d 1229 (1999).

---

[8](...continued)
watched the interview on television from another room were testimonial); Rangel v. State, 199 S.W.3d 523, 532-35 (Tex. App. 2006) (child's statements describing sexual assault during videotaped interview conducted by a Child Protective Services investigator were testimonial).

The State cannot show the improper testimony did not contribute to the verdict. Although B.A. repeated essentially the same allegations to her mother, the mental health counselor and her stepfather, there was no physical or forensic evidence to support those allegations. Because the State's evidence rested solely on the statements B.A. made to others, it is likely the jury based its decision on the fact B.A. repeated the allegations to a number of people, including Jensen and particularly Buster, who she knew was a police officer. Therefore, their improper testimony could have influenced the jury and contributed to the verdicts. The error in admitting the testimony was not harmless and Beadle's convictions should be reversed.

3. EVIDENCE OF B.A.'S BEHAVIOR AND REFUSAL TO TESTIFY AT THE FIRST PRETRIAL HEARING WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL.

The court admitted testimony that B.A. was crying, upset and sat in a fetal position for an hour when she was brought to court to testify at the first pretrial hearing. The testimony was irrelevant and unfairly prejudicial.

The appellate court reviews a trial court's decision to admit evidence for an abuse of discretion. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). ER 402 prohibits the admission of evidence that is not relevant. ER 401 defines "relevant evidence" as: "[e]vidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." To be relevant, evidence must meet two requirements: (1) it must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 12, 723 P.2d 726 (1987).

ER 403 requires the exclusion of evidence, even if relevant, if its probative value is outweighed by the danger of unfair prejudice. State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140 (1987), *rev. denied*, 108 Wn.2d 1003 (1987). To determine whether there is prejudice, "the linchpin word is 'unfair.'" Rice, 48 Wn. App. at 13. Unfair prejudice is caused by evidence "that is likely to arouse an emotional response rather than a rational decision among the jurors," Id. at 13, and which is of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). In doubtful cases, the issue should be resolved in favor of the defendant and the evidence excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Testimony that B.A. cried, was upset, balled herself in a fetal position and refused to testify at the first pretrial hearing did not make it more or less probable that Beadle molested her. That is particularly true where, as here, the record does not reveal the reason or reasons for B.A's behavior. Whatever the reasons, however, her behavior and refusal to testify at the hearing had no bearing whatsoever on whether Beadle committed the offenses.[9]

On the other hand, the evidence was unfairly prejudicial. Because the reasons for B.A's behavior or refusal to testify were unknown, jurors necessarily had to speculate on those reasons and were permitted to draw whatever inference their speculations led them to. Even if the reason for B.A.'s behavior was because she lied and she did not want to get caught in the lie or repeat the lie in front of Beadle, jurors would not have known that and more likely used the testimony to make an improper inference. For example, jurors could have improperly inferred B.A. was afraid of Beadle or that she suffered emotional trauma at the thought of testifying in front of Beadle because he in fact molested her. Regardless, the

---

[9] The State itself admitted the reason it wanted to present the testimony was "to explain to the jury why we have no victim here in person testifying." 4RP 13. That too was the reason the court found the testimony admissible. 4RP 15. There is nothing in the record to suggest either the State or the court believed the testimony relevant to any issue at trial.

testimony had one overriding consequence, it caused jurors to sympathize with B.A. and base their decision on that sympathy. Because the testimony had little if any relevance but tended to inflame the passion and sympathy of the jury, it was unfairly prejudicial. See, State v. Stationak, 1 Wn. App. 558, 463 P.2d 260 (1969) (evidence which contributes nothing of substance to a determination of the issues in the case, but appeals primarily to the sympathy or passion of the jury, is improper).

In Cunningham v. State, 801 So.2d 244 (Fla. App. 2001), the defendant was charged with sexually abusing a child. At a pretrial hearing on the State's request to admit the victim's statements into evidence, the child testified but became emotionally upset and could not continue. Id. at 245. At the trial a psychiatrist was allowed to testify that the child was emotionally unavailable to testify because she would most likely shut down and not answer questions. Id. at 246. The Cunningham court held the testimony was irrelevant and unfairly prejudicial. The court reasoned that the jury could improperly infer from the testimony the child's emotional unavailability was the result of being required to testify about events that were traumatic in her life in front of a person whom she is still extremely fearful and who was responsible for the trauma. Id. at 247. The court held an explanation of a witness's unavailability is not required. "That is

especially true in the case of the unavailability of a child witness due to the child's potential trauma if the child were to testify, because such testimony is unfairly prejudicial to the defense, tending to inflame the passion and sympathy of the jury." Id.

Like the testimony in Cunningham "explaining" the child's unavailability, the testimony here allowed the jury to improperly infer B.A. was emotionally unavailable to testify about traumatic events in front of a person whom she is still extremely fearful and who was responsible for the trauma. The testimony was unfairly prejudicial because it inflamed the jury's passion and sympathy.

An error is not harmless if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Admission of the improper testimony was not harmless. The State's only evidence was B.A.'s vague hearsay statements. Beadle testified and denied the allegations. The jury's decision came down to a credibility determination, despite B.A.'s absence from trial. Even though there was no evidence about the reason for B.A.'s behavior and initial refusal to testify, it is likely the jurors decided B.A. was the more credible because they inferred B.A. was so traumatized and afraid of Beadle that she could not testify in front

of him. Jurors also likely sympathized with B.A., a young child who exhibited an emotional reaction when asked to testify against the man she accused for molesting her, and based their decision on that sympathy and not on a reasoned analysis of the facts. Thus, Beadle's conviction should be reversed.

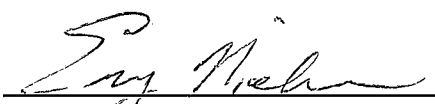
D. CONCLUSION

For the above reasons, either alone or together, Beadle was denied his right to a fair trial and his convictions should be reversed.

DATED this 25 day of August, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON Respondent, vs. STEVEN BEADLE, Appellant.	)))))))))	COA NO. 37508-7-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LIAM MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

[X] STEVEN BEADLE
DOC NO. 778475
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF AUGUST, 2008.

x Patrick Mayovsky